Internal Revenue Service
SB/SE, Compliance
BIRSC, SS-8 Unit

Department of the Treasury
1040 Waverly Avenue-Stop 631
Holtsville, NY 11742

Release Number: 2010030006
Release Date: 3-16-10
Index (UIL) No: 3121-04-01
Third Party Communication: None

October 26, 2009

Form: SS-8

Person to Contact:

Telephone #:
Fax Number:

Refer Reply to: Case # 67226

Dear Taxpayer:

The purpose of this letter is to respond to a request for a determination of employment status, for Federal employment tax purposes, concerning the work relationship between , referred to as "the payer" in the rest of this letter, and , referred to as "the worker" in the rest of this letter. It has come to our attention that the services were performed in 2006, 2007 and 2008.

DETERMINATION RESULT

We hold the worker to have been an employee of the payer. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

DESCRIPTION OF WORK RELATIONSHIP

The payer runs a one person architectural business, where the worker provided her services as a part-time Bookkeeper. The worker's duties included but were not limited to, completing invoicing, recording client contact data, performed energy code plan reviews, data entry for and the in addition to any other general office tasks as needed.

The payer believes the worker to have been an independent contractor in part for the following reasons:

- Although the payer did not submit documentation to support his claim he maintains that “ ” has classified the worker as an independent contractor. Nevertheless, although we take the State’s assessments under consideration it is not sufficient evidence for the SS-8 worker status determination process not to render a determination. We are obligated to follow the guidelines set forth by the Federal Government in determining worker status and we do not rely on any State decisions.

- There was a verbal agreement whereby the worker agreed to an independent contractor status. However, Federal guidelines stipulate that a contractual designation, in of itself, is not sufficient evidence for determining worker status. The facts and circumstances under which the worker performs services are determinative of the worker’s status. Treas. Reg. 31.3121(d)-1(a)(3) provides that the designation or description of the parties is immaterial. This means the substance of the relationship, not the label, governs the worker’s status. In addition, it is the firm’s responsibility to treat workers according to federal employment tax guidelines and law. Neither the firm nor the worker has the option to choose whether the worker should be treated as either an independent contractor or an employee. Worker status is dictated by the characteristics of the work relationship. If the work relationship meets the federal employment tax criteria for an employer/employee relationship, federal tax law mandates that the worker be treated as an employee.

Therefore, to clarify the Federal Government’s position on worker status we will be determining this case based on their common law practices in which the actual relationship between the parties is the controlling factor in determining worker status.

The worker states that she was trained by the payer on how to perform Energy Code Plan Reviews, how to invoice, and directed on the required procedures for typing other various service reports. The worker received her assignments from the payer, and although the worker developed many of her own methods to complete her assignments, the payer retained the right, if necessary to protect the business interests, to change these methods. The payer was ultimately responsible for the resolutions of any problems or complaints that arose from the services provided by the worker. The worker performed her services at the payer’s location as well as from her own home on schedules agreed upon between the parties and was not necessarily required to perform them personally. All of these facts indicate the payer’s control over the services provided by the worker in that she was required to perform her services under the direction and supervision of the payer. It is clear that the worker was not free to act independently.

The payer provided the computer, printers, fax machine, telephones, all office supplies which included the firm’s letterhead, postage and mail out post cards, while the worker provided her own accounting software and computer. The items provided by the worker did not constitute a substantial investment on her part since Federal guidelines specify

that the “Lack of investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term “significant investment” does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. See Rev. Rul. 71-524, 1971-2 C.B. 346”.

The customers paid the payer and the worker was remunerated in the form of an hourly rate. The worker was not engaged in an independent enterprise requiring capital outlay or the assumption of a business risk, and therefore could not realize a profit or incur a loss as a result of the relationship. The above factors point towards the payer’s control over the financial aspects of the affiliation since the worker had no control over the rates charged to the customer, the customer did not pay her directly for her services, and her wages were set by the payer.

The worker did not receive any benefits. The worker did not own her own business and did not maintain a business telephone listing. Our investigation discovered that she did not perform similar work for others while engaged by the payer, nor did she advertise herself as available for similar work. The worker performed her services under the name of the payer, and her work was fundamental to the payer’s business and not part of any kind of independent venture. The worker’s services were continuous from June of 2006 through October of 2008 as opposed to a single one-time transaction and both parties retained the right to terminate the relationship without penalty or liability to one another. In fact the relationship has ended. The above facts do not reflect a business presence for the worker, but rather strongly reflect the payer’s control over the worker’s services and integration into the payer’s business.

LAW

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.”

Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It

is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

If a worker performs more than de minimis services for a multiple of unrelated persons or payers at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, it is possible for a person to work for a number of people or payers concurrently and be an employee of one or all of them.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral controls, financial controls, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

Factors that illustrate how the parties perceive their relationship include the the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

Based on the above analysis, we conclude that the payer had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

TAX RAMIFICATIONS

Compensation to an individual classified as an employee is subject to Federal income tax withholding, Federal Insurance Contributions Act tax (FICA), and Federal Unemployment Tax Act (FUTA) tax as provided by sections 3101, 3301, and 3401 of the Internal Revenue Code, and it is possible you are liable for the same.

This determination is based on the application of law to the information presented to us and/or discovered by us during the course of our investigation; however, we are not in a position to personally judge the validity of the information submitted. This ruling pertains to all workers performing services under the same or similar circumstances. It is binding on the taxpayer to whom it is addressed; however, Section 6110(k)(3) of the Code provides it may not be used or cited as precedent.

Internal Revenue Code section 7436 concerns reclassifications of worker status that occur during IRS examinations. As this determination is not related to an IRS audit, it does not constitute a notice of determination under the provisions of section 7436, nor is this an audit for purposes of entitling you to section 530 relief (further explained below) if you are not otherwise eligible for such relief.

OPTIONS AND ASSISTANCE

The SS-8 Program does not calculate your balance due and send you a bill. You are responsible for satisfying the employment tax reporting, filing, and payment obligations that result from this determination, such as filing employment tax returns or adjusting previously filed employment tax returns. Your immediate handling of this correction and your prompt payment of the tax may reduce any related interest and penalties. If you do not already have one, you are encouraged to obtain an Employer Identification Number and then file/adjust your employment tax returns accordingly.

Section 530 of the 1978 Revenue Act established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. This is explained more fully in the enclosed fact sheet. It is important to note that this office does not have the authority to grant section 530 relief in relation to this determination. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should IRS select your return(s) for audit. The SS-8 determination process is not related to an examination of your returns. There is also no procedure available to you by which you can request an audit for the purpose of addressing your eligibility for section 530 relief. You should contact a tax professional if you need assistance with this matter.

If you are not eligible for section 530 relief, and the failure to pay the correct amount of employment tax was due to the misclassification of a worker's status, you must use the rates outlined in section 3509 of the Code to calculate your liability.

IRC Section 3509(a) rates

The rates under IRC section 3509(a) total 10.68% of the wages paid up to the Social Security wage base for such year and 3.24% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding

is 1.5 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the **employee's** share of the social security and Medicare taxes is 20 percent of the full rate (20% of 6.20%=1.24% of wages up to the Social Security wage base; 20% of 1.45%=.29% of the total wages, including wages in excess of the Social Security wage base).

- FICA Taxes - Your liability for the **employer's** share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

IRC Section 3509(b) rates

If you did not file required information returns (e.g., Form 1099-MISC) consistent with treating the worker as not being an employee, you must use the rates under IRC section 3509(b). They total 13.71% of the wages paid up to the Social Security wage base for such year and 5.03% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 3 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the employee's share of the social security and Medicare taxes is 40 percent of the full rate (40% of 6.20%=2.48% of wages up to the Social Security wage base; 40% of 1.45%=.58% of the total wages, including wages in excess of the Social Security wage base).

- FICA Taxes - Your liability for the employer's share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

Section 3509(c) provides that these rates do not apply in cases of intentional disregard of the requirement to deduct and withhold the tax, nor do section 3509 rates apply to taxes due on wages paid in any period within the current calendar year.

If you deem that the payer meets the criteria for section 530 relief as outlined in the enclosure, you do not have to file/adjust your employment tax returns to reflect this determination. Also, you may choose to reclassify this class of worker to employee status in accordance with this determination for future periods without jeopardizing your ability to claim section 530 relief for past periods.

If you need further assistance in filing/adjusting your employment tax returns due to the reclassification of your worker, please call the IRS help line at 1-800-829-4933. Call 1-866-455-7438 for assistance in preparing or correcting Forms W-2, W-3, 1099, 1096,

or other information returns. If you have any questions concerning this determination, please feel free to contact the person whose name and number are listed at the top of this letter. Please refer to your case number (67226) when contacting us about this case.

Sincerely,

Operations Manager

Enclosures: Section 530 Fact Sheet
Notice of IRS Compliance Expectations
Notice 441
Sanitized Determination Letter for Public Disclosure

* To order forms and publications, please call 1-800-TAX-FORM or visit us online at www.irs.gov/formspubs.

cc: